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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted] 208

CHICAGO CUTTER-KARCHER, INC.,
Petitioner,

vs.

CHARLES D. MALEY, TRUSTEE OF LORD'S INC.,
Bankrupt,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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CITATION.

Case.

U. S. National Bank v. The Blauner's Affiliated Store 75 F. 2d (3 Cir. 1935) 4, 5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

THE OPINION BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit is reported at 356 F. 2d 456 and is set forth in the appendix to the petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED FOR REVIEW.

This case arises out of a bankruptcy proceeding and involves the interpretation of a lease between Lord's, Inc. ("bankrupt"), as lessor, and petitioner, as lessee, relating to the operation by petitioner of a shoe department in the bankrupt's department store. At the time of the bankrupt's adjudication, the bankrupt had in its general bank account (which was its only bank account) the proceeds of the sales made in petitioner's shoe department. The only question presented in this case is whether the proceeds from the sales in the shoe department constitute trust funds under the lease. The Referee in Bankruptcy, the District Court and the Court of Appeals all concluded that they were not trust funds. Instead, the courts below held that a debtor-creditor relationship was created and the petitioner was a general unsecured creditor of the bankrupt. This case does not involve a constitutional question, the interpretation of a federal statute, or a question important to the administration of the Bankruptcy Act. This case simply involves the interpretation of a lease.

STATEMENT OF THE CASE.

The lease involved consists of 8 pages and 21 separately designated paragraphs. Among others, the lease contains the following provisions:

a) All sales in petitioner's shoe department were to be made in the name of the bankrupt and the proceeds thereof immediately turned over to the bankrupt.

b) The bankrupt was permitted to commingle the proceeds of petitioner's shoe sales with all of its other funds.

c) The bankrupt had complete and unrestricted use of the proceeds of the shoe sales.

d) The bankrupt had the right to approve and pass upon credit sales, and such approval, when given, was a guaranty by the bankrupt that payment would be received.

e) The bankrupt had final authority to decide and adjust controversies between petitioner and its customers and to charge petitioner's account therefor.

The referee found that during the 8-year period the lease was in effect, petitioner had actual knowledge that the bankrupt maintained only one bank account in which it deposited all of its funds and from which it paid all of its obligations. The Referee also found that the bankrupt periodically was delinquent in making its remittances to petitioner and that petitioner never requested the bankrupt to maintain a separate account or in any other way segregate the proceeds of the shoe sales. The Referee in Bankruptcy, the District Court and the Court of Appeals concluded that the lease, and the conduct of the parties thereunder, created a debtor-creditor relationship.

ARGUMENT.

The only question presented involves the interpretation of a lease. Petitioner urged throughout these proceedings that the lease created a trust. Its corporate affiliate, in the amicus brief filed with the Court of Appeals, argued that the lease created a bailment. The Referee in Bankruptcy, the District Court and the Court of Appeals all held that it created a debtor-creditor relationship.

Clearly, on the undisputed facts and on the rulings below this case does not in any respect affect the administration of the Bankruptcy Act. It is purely a coincidence that the lease question arose in a bankruptcy case.

Petitioner has demonstrated no compelling economic or equitable reason for the issuance of a writ of certiorari. As stated in the opinion of the Court of Appeals, department store lessees may protect their interests merely by requiring the maintenance of a separate account for the proceeds of their sales.

The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter. The decisions of the courts below are correct and in accord with well-established law. The cases cited by petitioner do not deal with the question presented here, that is, whether a trust is created in an agreement which permits the purported trustee to commingle and have unrestricted use of the funds.

Petitioner erroneously states that the Court of Appeals misinterpreted *U. S. National Bank v. The Blauner's Affiliated Stores, Inc.*, 75 F. 2d 826 (3rd Cir. 1935). In its opinion, the Court of Appeals clearly distinguished *Blauner's* on the ground that the funds in that case were not

commingled but were kept in a separate distinct account. Furthermore, petitioner's reference to the lease involved in *Blauner's* is clearly improper since those documents were never made a part of the record in this case but were referred to for the first time in petitioner's petition for rehearing en banc filed with the Court of Appeals.

CONCLUSION.

Respondent respectfully submits that petitioner has failed to demonstrate special and important reasons requiring review of this case on writ of certiorari. Certiorari jurisdiction was not conferred upon the court merely to give the defeated party another hearing. It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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